STATE OF MICHIGAN

COURT OF APPEALS

GREG SCHNEIDER,

Plaintiff-Appellee,

v

ROBERT BYRNE,

Defendant-Appellant.

UNPUBLISHED
September 20, 2005

No. 253998
Oakland Circuit Court
LC No. 2003-050460-CK

Before: Hoekstra, P.J., and Gage and Wilder, JJ.

PER CURIAM.

In this action for specific performance of a contract for the sale of a vintage automobile, defendant appeals as of right the trial court's order granting summary disposition in favor of plaintiff pursuant to MCR 2.116(C)(10). We affirm.

Defendant purchased the car at issue here approximately thirty years ago, then stored it in the basement of his condominium unit along with another vehicle. In early 2003, defendant advertised the vehicle for sale. Plaintiff responded to the advertisement and, after viewing the vehicle, gave defendant a $5,000 check and handwrote a document stating, in relevant part:

> Received from Greg Schneider Five Thousand ($5000.-) as a deposit on a circa 1959-1962 Indianapolis Roadster #3. Total price $75,000.- Balance due $70,000.-

Defendant signed and dated the document, and later deposited plaintiff's check into his bank account. Defendant subsequently discovered that his condominium association would not permit him to remove the vehicle from the basement of his unit unless he first agreed to repair any damage incurred during the removal and to also remove the other vehicle at the same time. Defendant thereafter attempted to return plaintiff's "deposit" funds, stating that he was unable to deliver the vehicle. This suit followed.

We review de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The existence and interpretation of a contract present questions of law also reviewed de novo on appeal. *Bandit Industries, Inc v Hobbs Int'l, Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001). When reviewing a motion under MCR 2.116(C)(10), this Court considers the documentary evidence submitted by the parties in the light most favorable to the non-moving party to determine whether there exists

a genuine issue regarding any material fact. *Maiden, supra* at 120. A genuine issue of material fact exists when the record reveals a factual issue on which reasonable minds could differ. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Defendant argues that summary disposition was improper because there remained genuine issues of material fact regarding whether the writing at issue here contains the essential elements of a contract. We disagree. The elements of a valid contract are (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991). With respect to these elements, defendant asserts that there was no mutuality of agreement and, therefore, no valid contract, because he believed that the parties had only agreed to payment of $5,000 for defendant to hold the car pending further negotiation. See *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 548-549; 487 NW2d 499 (1992) (mutuality of agreement refers to a "meeting of the minds" on all material terms of the contract). However, whether there has been "a meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind."[1] *Marlo Beauty Supply, Inc v Farmers Ins Group of Cos*, 227 Mich App 309, 317; 575 NW2d 324 (1998). Here, the evidence indicates that defendant executed a writing drafted by plaintiff and plainly setting forth an agreed upon price for the vehicle in question. This writing also acknowledges defendant's receipt of a sizeable deposit toward the agreed upon purchase price, as evidenced by a clear statement of the "balance due" and defendant's negotiation of the check issued by plaintiff to cover the deposit amount. Even when viewed in a light most favorable to defendant, reasonable minds could not differ regarding the objective import of this evidence, i.e., that the parties had reached a mutual agreement concerning the sale of the automobile. *West, supra*; *Marlo, supra*. Moreover, contrary to defendant's assertion, the fact that the parties failed to expressly negotiate such terms as the time and manner of payment, date of delivery, and risk of loss, does not serve to invalidate the agreement. An instrument is enforceable as a contract even though incomplete or indefinite in some of its terms if it is established that the parties intended to be bound by the agreement. *J W Knapp Co v Sinas*, 19 Mich App 427, 431; 172 NW2d 867 (1969); see also MCL 440.2204(3) ("[e]ven though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonable certain basis for giving an appropriate remedy").[2] Accordingly, the trial

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[1] Although defendant is correct that "parol evidence is always competent to show the nonexistence of a contract," admission of parol evidence to change a writing is not. *Tepsich v Howe Constr Co*, 377 Mich 18, 23; 138 NW2d 376 (1965). In arguing that the deposit was made merely so that defendant would hold the vehicle pending further negotiation, defendant seeks to change the meaning of the writing, not to show that it "was a sham not intended to create legal relations." *Id*.

[2] Where a contract for the sale of goods does not specify such terms, Article 2 of the Uniform Commercial Code, MCL 440.2101 *et seq*., provides default rules to fill such "gaps." See, e.g., MCL 440.2308 (concerning place for delivery); MCL 440.2309 (concerning time for delivery or any other action under the contract); MCL 440.2310 and MCL 440.2507 (concerning time, place, and manner of payment); and MCL 440.2509 (concerning risk of loss).

court did not err in granting summary disposition on the ground that there exists no genuine issue of material fact regarding whether the essential elements of a contract are present.[3]

Defendant next argues that plaintiff defrauded him by failing to disclose his greater knowledge that the vehicle was actually a different and significantly more valuable model than believed by defendant. Again, we disagree. There was no evidence that plaintiff was actually aware of the vehicle's true nature at the time of the contract. Moreover, presuming such evidence exists, "silent fraud" is only cognizable in Michigan if "it occurred under circumstances where there was a legal duty of disclosure." See *M & D, Inc v W B McConkey*, 231 Mich App 22, 28-29; 585 NW2d 33 (1998). Defendant alleges only that plaintiff knew a fact that he did not. This alone does not give rise to a duty to disclose. *Id*. at 30-34. Further, in the context of nondisclosure of information, "'there can be no fraud where the means of knowledge regarding the truthfulness of the representation are available to the plaintiff and the degree of their utilization has not been prohibited by the defendant,'" provided that there was some indication that further inquiry was needed. *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 501; 686 NW2d 770 (2004), quoting *Webb v First of Michigan Corp*, 195 Mich App 470, 474; 491 NW2d 851 (1992). Defendant advertised the vehicle at issue for sale based on a "personal estimate," without consulting known sources about the car's history. He was also aware when he bought the vehicle that he lacked its complete history and how he could complete that history, but opted not to do so. Because the evidence does not reasonably support a finding that plaintiff violated any duty of disclosure to defendant, summary disposition was appropriate.

Finally, defendant argues that performance of the contract was excused under MCL 440.2615 because the condominium association's conditions for removal of the vehicle rendered his performance impracticable. We conclude that defendant failed to present sufficient evidence to create a genuine issue of material fact so as to avoid summary disposition based on an impracticability defense.

MCL 440.2615(a) states in relevant part that nonperformance of a contract for sale is not a breach of that contract "if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made . . . ." "Impracticable" means "incapable of being put into practice or use with the available means." Random House Webster's College Dictionary (1992). Black's Law Dictionary (7th Ed) at 760, further notes that "[f]or performance to be truly impracticable, the duty must become much more difficult or much more expensive to perform, and this difficulty or expense must have been unanticipated" and must "cause extreme and unreasonable difficulty."

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[3] In reaching this conclusion, we reject defendant's assertion that summary disposition was nonetheless improper because the trial court erroneously concluded that the advertisement commissioned by plaintiff constituted a valid "offer" to sell. See, e.g., 1 Restatement Contracts, 2d, § 26, p 75-76. Indeed, because we have determined that the parties ultimately reached a mutual agreement regarding the sale, it is irrelevant whether the advertisement itself met the requirements of a valid offer. See *Kamalnath, supra* at 549 ("[a] contract is made when both parties have executed or accepted it . . . .").

Thus, impracticability is inherently comparative in nature: it requires an unexpected deviation from the expected course of events, and that deviation must render performance "much more difficult or much more expensive."

Defendant was aware at the time of the contract that the vehicle could only be removed by running it across the common area behind four other condominium units. He could not reasonably have been unaware of the potential for causing damage in the process or the fact that he would be obligated to repair any damage he caused. Therefore, the first of the condominium association's requirements could not have been unanticipated and cannot excuse nonperformance. However, the condominium association's requirement that he remove both vehicles or neither was clearly not anticipated.

Nevertheless, defendant did not present any evidence below regarding the cost of removing both vehicles. "When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial." *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 324; 675 NW2d 271 (2003). Of course, the burden rests on a defendant to establish a contractual defense such as impracticability. See *Rory v Continental Ins Co*, 473 Mich 457, 470; ___ NW2d ___ (2005) (indicating that to avoid enforcement of a contract a party has to establish a traditional contractual defense). Here, because defendant did not present evidence regarding the costs of removing both vehicles, there was no evidence to indicate that doing so would pose an impracticable burden. Consequently, defendant failed to create a genuine issue of material fact regarding the contractual defense of impracticability, thereby rendering the trial court's grant of summary disposition in favor of plaintiff, proper.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder